

BROWNE GEORGE ROSS
O'BRIEN ANNAGUEY & ELLIS LLP
Peter Obstler (State Bar No. 171623)
pobstler@bgrfirm.com
Eric M. George (State Bar No. 166403)
egeorge@bgrfirm.com
Dennis S. Ellis (State Bar No. 178196)
dellis@bgrfirm.com
Debi A. Ramos (State Bar No. 135373)
dramos@bgrfirm.com
2121 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
Telephone: (310) 274-7100
Facsimile: (310) 275-5697

Attorneys for Kimberly Carleste Newman, Lisa
Cabrera, Catherine Jones, Denotra Nicole Lewis,
Andrew Hepkins, Harvey Stubbs, Khalif
Muhammad, Keu Reyes and Osiris Ley

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

Kimberly Carleste Newman, Lisa Cabrera,
Catherine Jones, Denotra Nicole Lewis,
Andrew Hepkins, Harvey Stubbs, Khalif
Muhammad, Keu Reyes and Osiris Ley

Plaintiffs,

vs.

Google LLC, YouTube LLC, Alphabet Inc.
and Does 1 through 100, inclusive,

Defendants.

Case No. 5:20-cv-04011-LHK

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION TO STRIKE PORTIONS
OF DEFENDANTS' 12(b)(6) MOTION
AND EXHIBITS; OR IN THE
ALTERNATIVE TO CONVERT THE
MOTION TO A RULE 56 MOTION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

*(Filed concurrently with Declaration of Debi
Ramos in Support of Motion; (Proposed)
Order Granting Plaintiffs' Motion)*

Judge: Hon. Judge Lucy H. Koh
Date: March 11, 2021
Time: 1:30 p.m.
Crtrm.: 8

Trial Date: None Set

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NOTICE OF MOTION AND MOTION TO STRIKE

TO DEFENDANTS GOOGLE LLC AND YOUTUBE LLC AND THEIR ATTORNEYS
OF RECORD:

PLEASE TAKE NOTICE that on March 11, 2021, at 1:30 p.m., or as soon thereafter as counsel may be heard by the Honorable Lucy H. Koh of the United State District Court for the Northern District of California, located in Courtroom 8, Fourth Floor, 280 South 1st Street, San Jose, California, Plaintiffs Kimberly Carleste Newman, Lisa Cabrera, Catherine Jones, Denotra Nicole Lewis, Andrew Hepkins, Harvey Stubbs, Khalif Muhammad, Keu Reyes and Osiris Ley (collectively "Plaintiffs") will respectfully move this Court for an order (i) converting the Defendants' Motion to a Federal Rules of Civil Procedure, Rule 56 Motion and authorizing Plaintiffs to conduct discovery in order to oppose that motion, or, in the alternative, (ii) striking specified portions of Defendants' Motion to Dismiss ("MTD") dated November 2, 2020, and Exhibits thereto, on grounds that they are not properly before Court in connection with a motion under Federal Rules of Civil Procedure, Rule 12(b)(6) and other applicable law.

This motion is based upon this Notice of Motion, the supporting Memorandum of Points and Authorities, attached hereto; the Declaration of Debi Ramos in Support and Related Exhibits, filed concurrently herewith; as well as the pleadings, records and papers on file in this action, oral argument of counsel, and any other evidence that is presented to the Court at the time of the hearing.

DATED: January 20, 2021

BROWNE GEORGE ROSS
O'BRIEN ANNAGUEY & ELLIS LLP



By: _____

Debi Ramos

Attorneys for Plaintiffs Kimberly Carleste Newman,
Lisa Cabrera, Catherine Jones, Denotra Nicole Lewis,
Andrew Hepkins, Harvey Stubbs, Khalif Muhammad,
Keu Reyes and Osiris Ley

REQUESTED RELIEF AND ISSUES

In accordance with Rule 12(b) of the Federal Rules of Civil Procedure, Plaintiffs respectfully request that the Court convert Defendants’ Motion to Dismiss to a Motion for Summary Adjudication under Federal Rules of Civil Procedure, Rule 56, and authorize Plaintiffs to conduct discovery in order to oppose that motion.

In the alternative, the Court should strike the following Exhibits attached to the Declaration of Lauren Gallo White on grounds that Defendants have failed to proffer foundational facts sufficient to demonstrate that (a) the documents are authentic, (b) the documents are relevant to the extent that they (i) were referenced or quoted in the Second Amended Complaint, (ii) either were executed by the Plaintiffs, or were incorporated by reference into a contract executed by the Plaintiffs, and (d) the documents predate Plaintiffs’ June 16, 2020 Complaint:¹

1. Exhibit 1: YouTube’s “Terms of Service” dated December 10, 2019;
2. Exhibit 2: YouTube’s “Terms of Service Terms of Service” predating December 10, 2019;
3. Exhibit 3: YouTube’s undated “Community Guidelines” consisting of links to guidelines regarding various subject and other “articles;”
4. Exhibit 4: YouTube’s undated “Harassment and Cyberbullying Policy;”
5. Exhibit 5: YouTube’s undated “Violent or Graphic Content Policies;”
6. Exhibit 6: YouTube’s undated “Hate Speech Policy;”
7. Exhibit 7: YouTube’s undated “Rate Your Content With Self-Certification;”
8. Exhibit 8: YouTube’s undated “Your Content & Restricted Mode;”
9. Exhibit 9: YouTube’s “Update September 2020” “Partner Program Overview & Eligibility;”
10. Exhibit 10: YouTube’s undated “Partner Program Terms;”

¹ Here, only three of the fourteen exhibits is dated. Of those, two exhibits are dated *after* Plaintiffs filed their Complaint in June of 2020. Before the Court considers any of the electronic documents as relevant to this dispute, the Defendants should at the very least demonstrate that they predate Plaintiffs’ lawsuit – otherwise, Defendants could amend the contract documents so as to avoid or undermine Plaintiffs’ existing claims.

11. Exhibit 11: YouTube’s “Updated October 2020” “Channel Monetization Policies;”

12. Exhibit 12: Google’s undated “AdSense Program Policies;”

13. Exhibit 13: Google’s undated “Advertiser-Friendly Content Guidelines;”

14. Exhibit 14: Google’s undated “AdSense Online Terms of Service.”

Plaintiffs also respectfully request that the Court strike and refuse to consider the following passages from the Defendants’ Motion and Memorandum of Points and Authorities,² on grounds that (a) the passages are not properly supported by the citations to the Second Amended Complaint or authenticated documents attached as Exhibits to the moving papers, (b) the passages are supported by citation to matters upon which the Defendants cannot rely as a matter of law, or (c) the passages are not support by citation to anything at all:

1. MTD 1:28-2:3;

2. MTD 2:4;

3. MTD 2:4-5;

4. MTD 2:22-23;

5. MTD 3:4-5;

6. MTD 2:10-12;

7. MTD 3:8-9;

8. MTD 4:17-20;

9. MTD 15:16-17;

10. MTD 15:17-19;

11. MTD 15:19-22;

12. MTD 15:22-28;

13. MTD 5:20-28;

14. MTD 22:19-22;

² Full quotations of the Defendants’ assertions, along with the full texts cited by Defendants in their moving papers can be found in Exhibits A-C to the Declaration of Debi Ramos, filed concurrently herewith. The paragraph numbers in the Exhibits correspond with the numbers of the passages set forth herein.

15. MTD 22:22-25;
16. MTD 4:2-4;
17. MTD 23:6-14;
18. MTD 4:11-14;
19. MTD 5:11-13;
20. MTD 8:15-18;
21. MTD 8:19-20;
22. MTD 9:16-18;
23. MTD 10:4-10;
24. MTD 10:3-20;
25. MTD 10:21-26;
26. MTD 2:5-9;
27. MTD 2:14-16;
28. MTD 3:15-19;
29. MTD 2:25-3:1;
30. MTD 3:1-3; and
31. MTD 2:23-25.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Plaintiffs’ Second Amended Complaint (“SAC”) alleges that on September 14, 2017, Defendants admitted that the software they use to make decisions about filtering and blocking content and access to services is based (at least in part) on the identity of both the creators and their viewers, including considerations of race, gender, and sexual orientation. SAC ¶¶51. Defendants admitted previously that their decisions regarding filtering and blocking content and access to services were based on the identity of users. SAC ¶¶49-50. After three years, Defendants have failed to fix the software; accordingly, video curation, filtering and monetization decisions continue to be made based on the identity, including the race, of the creators or viewers. See SAC ¶¶50, 52. Defendants’ admissions and failure to fix the problem reflect a conscious decision to continue using software that considers race in the filtering and blocking content and access to services, and evidence Defendants’ intention to engage in race based discrimination. SAC ¶¶61-62.

On a Motion to Dismiss under Rule 12(b)(6), Defendants cannot argue they do not consider the race of YouTube users in filtering and blocking content and access to YouTube. See MTD 2:4 (plaintiffs’ “claims are false and unsupported by anything other than baseless rhetoric”); 1:28-2:3 (plaintiffs’ claims are “just different views about how YouTube’s policies should be applied or possible imperfections in YouTube’s content review systems”). Thus to the extent that Defendants seek to disprove their own admissions and other factual allegations that they knowingly discriminate on the basis of race, Defendants have presented fourteen Exhibits which purport to be “contract” documents. Defendants also incorporated roughly two and one-half dozen factual assertions, most of which are based loosely on the unauthenticated Exhibits, asking the Court to find that Plaintiffs failed to demonstrate facts upon which relief may be granted under 42 U.S.C. §1981 and the Unruh Act. That is improper because Rule 12(b)(6) is not a vehicle to adduce new evidence, dispute one’s own admissions, or otherwise challenge Plaintiffs’ other allegations that Defendants are using Plaintiffs’ race or personal identity or viewpoints to filter and block content and access to services in violation of YouTube’s neutral content based rules.

Rule 12(b)(6) motions serve to test the sufficiency of *Plaintiffs' allegations* as set forth in the Complaint. They are not designed to test the *sufficiency of the evidence* in support of Plaintiffs' claims for relief at the outset of litigation. Accordingly, the Court should either (i) convert Defendants' Motion to Dismiss under Rule 12(b)(6) to a Motion for Summary Judgment under Rule 56, and allow the parties to conduct discovery regarding the factual issues and disputes that arise in the Defendants' Motion to Dismiss (*see Rodriguez v. Wells Fargo Bank, N.A.*, No. 11-CV-05172 RMW, 2011 WL 6304152, at *3-4, 5 (N. D. Cal. Dec. 16, 2011); *Duncan v. Cohen*, No. C08-2243 BZ, 2008 WL 2891065, at *5 (N.D. Cal. July 22, 2008); *Intermedics, Inc. v. Ventritex, Inc.*, 775 F.Supp. 1269, 1275 (N.D. Cal. 1991), *aff'd sub nom. Intermedics, Inc. v. Ventritex Co.*, 991 F.2d 808 (Fed. Cir. 1993); *see also Edison v. GEO Grp.*, No. 1:12-CV-01933 AWI, 2013 WL 459891, at *3 (E.D. Cal. Feb. 4, 2013); *Odish v. Cognitive Code Corp.*, No. CV129069FMOJCGX, 2013 WL 12129865, at *2 (C.D. Cal. July 29, 2013); *Mireskandari v. Daily Mail & Gen. Tr. PLC*, No. CV1202943MMMFFMX, 2012 WL 12887749, at *2 (C.D. Cal. Aug. 21, 2012)); or (ii) strike Defendants' unsupported factual allegations and improper Exhibits before ruling on Defendants' Motion. *See Schmitz v. Mars, Inc.*, 261 F.Supp.2d 1226, 1229 (D. Ore. Mar. 6, 2003) (striking declaration and exhibit submitted in connection with a motion to dismiss); *see also Doe v. Webster*, 606 F.2d 1226, 1243 (courts "strike improper evidence"); *In re NASDAQ Market-Makers Antitrust Litigation*, 164 F.R.D. 346, 249-250 ((citing *Jenkins v. City of New York*, No. 91 Civ. 3639 (RLC), 1992 WL 147647 (S.D.N.Y. June 15, 1992) (striking affidavit opposing summary judgment as improper hearsay)); *Sierra Pacific Industries v. U.S. Dept. Agriculture*, 40 Media L. Rep. 1499, at *3 ("The court retains the inherent authority to strike any documents it finds to be improper").

II. RELEVANT FACTS

A. Defendants Attach Fourteen Exhibits Without Foundational Facts

Defendants attach fourteen exhibits to Defense Counsel's Declaration in Support of the Rule 12(b)(6) Motion³ -- Exhibit 1: YouTube's "Terms of Service" dated December 10, 2019;

³ Declaration of Lauren Gallo White ("White Dec.").

1 Exhibit 2: YouTube’s “Terms of Service Terms of Service” predating December 10, 2019;
 2 Exhibit 3: YouTube’s undated “Community Guidelines” consisting of links to guidelines
 3 regarding various subject and other “articles;” Exhibit 4: YouTube’s undated “Harassment and
 4 Cyberbullying Policy;” Exhibit 5: YouTube’s undated “Violent or Graphic Content Policies;”
 5 Exhibit 6: YouTube’s undated “Hate Speech Policy;” Exhibit 7: YouTube’s undated “Rate Your
 6 Content With Self-Certification;” Exhibit 8: YouTube’s undated “Your Content & Restricted
 7 Mode;” Exhibit 9: YouTube’s September 2020 “Partner Program Overview & Eligibility;”
 8 Exhibit 10: YouTube’s undated “Partner Program Terms;” Exhibit 11: YouTube’s October 2020
 9 “Channel Monetization Policies;” Exhibit 12: Google’s undated “AdSense Program Policies;”
 10 Exhibit 13: Google’s undated “Advertiser-Friendly Content Guidelines;” and Exhibit 14:
 11 Google’s undated “AdSense Online Terms of Service.” White Dec., Exhibits 1-14, respectively.
 12 The White Declaration does not provide any foundational facts to establish the authenticity of any
 13 of these documents (e.g., when they were created, that they were in fact signed electronically by
 14 each of the Plaintiffs, when they were signed, whether they were altered or amended after
 15 Plaintiffs filed their Complaint in June 2020, and if so, what alterations or amendments were
 16 made). Absent the requisite foundational facts, this Court has no way of knowing that any of the
 17 Exhibits (which exist as electronic documents accessed by links on Defendants’ platforms) are
 18 authentic or relevant to this dispute.

19 **B. Defendants Make Numerous Improper Assertions of Fact**

20 In an attempt to counter Plaintiffs’ allegations that Defendants engage in race based
 21 discrimination and have admitted to doing so, Defendants make numerous factual assertions; the
 22 assertions are contrary to the SAC allegations; and the assertions are not properly supported by
 23 correct citation to the SAC or the Exhibits. A full list of all of the Defendants’ unsupportable
 24 assertions is set forth in Exhibit A, along with the full language of the text to which Defendants
 25 cite in support of the factual assertions.

26 Defendants’ most egregious unsupportable assertions are: (1) Plaintiffs’ alleged wrongs
 27 are merely “different views about how YouTube’s policies should be applied” or “imperfections in
 28 YouTube’s content review systems.” MTD 1:28-2:3; *see* Ex.A¶1. (2) “Content creators upload

1 videos to YouTube free of charge.” MTD 2:22-23; Ex.A¶4. (3) Under the Terms of Service,
 2 “YouTube reserves the right to remove content from its platform in its discretion,” presumably,
 3 including the discretion to remove content because of the race of the creator or viewers of the
 4 video. MTD 15:16-17; Ex.A¶9. (4) Defendants are authorized by contract to do everything of
 5 which the Plaintiffs complain. *See* MTD 2:10-12; Ex.A¶6. (5) Plaintiffs’ allegations regarding
 6 the eleven categories of wrongful conduct in ¶65 are all encompassed within Defendants’ rights to
 7 exclude videos content under the Terms of Service. MTD 15:22-28; Ex.A¶12; MTD 5:20-28;
 8 Ex.A¶13. (6) Plaintiffs’ allegations regarding the eleven categories of wrongful conduct in ¶65
 9 are all decisions of a publisher “regarding whether and how to display content produced by
 10 others—what kinds of content to pair with ads, how to organize and present content . . .” MTD
 11 22:19-25; Ex.A¶14-15. (7) Restricted Mode is a “paradigm example of technology designed to
 12 ‘maximize user control’ and to ‘empower parents to restrict their children’s access to
 13 objectionable or inappropriate online material.’” MTD 23:6-14; Ex.A¶17.

14 In essence, Defendants deny that they are engaged in intentional race based decisions
 15 regarding Restricted Mode and monetization. They point to non-discrimination language from the
 16 YouTube Terms of Service, Community Guidelines and AdSense Terms of Service; then assert
 17 that because Defendants’ written rules and policies prohibit racism, they are not engaged in racist
 18 filtering and blocking of content and access to services. Defendants also point to their own rules
 19 which allow Defendants to remove racist, bullying, harassing content, and to YouTube’s new fund
 20 to support Black creators, and ask the Court to conclude that there is no evidence that Defendants’
 21 have racist intent. However, in doing so, Defendants entirely ignore the detailed SAC allegations
 22 regarding Defendants’ prior admissions that curation, filtering and monetization decisions were
 23 made based in part on racial considerations.

24 Having denied that they engage in racist decision making, and that they have even a tiny
 25 racist bone in their social media body, Defendants then cobble together a string of blurbs from the
 26 Exhibits which generally state that Defendants have discretion to curate videos, filter content,
 27 remove content that violates the Terms of Service and Community Guidelines, and have discretion
 28 to place ads, where to place them, and the number and qualities of the ads **in order to suggest** that

1 under the Terms of Service and Community Guidelines, **Defendants have absolute discretion**
 2 **regarding Plaintiffs’ content, *including the discretion to make decisions based on the race of***
 3 ***the YouTube creators and viewers.*** Fortunately, the Terms of Service and Community Guidelines
 4 do not give Defendants “absolute” discretion; but rather, frame Defendants’ discretion in the
 5 context of what Defendants may do when YouTube users break the Terms of Service and/or
 6 Community Guidelines when posting videos on the platform. The Terms of Service and
 7 Community Guidelines frame Defendants’ authority to impose restrictions and sanctions as a
 8 result of content violations; they do not give Defendants absolute authority to act, much less to act
 9 based upon the race of the creators and viewers.

10 Defendants also attempt to rely on the ruling granting the Defendants’ Motion to Dismiss
 11 Prager University’s state claims in *Prager II*⁴ which is improper. MTD 2:5-9; Ex.B¶26-27; *see*
 12 *also* MTD 23:6-14; Ex.C¶35.

13 To give the impression that Plaintiffs’ allegations are wrong regarding racial
 14 discrimination on the platform, Defendants further improperly assert as facts things that are not
 15 supported at all by the materials Defendants cited. For example, Defendants assert that “large
 16 numbers” of African American, Puerto Rican and Mexican American content creators use
 17 YouTube (MTD 2:25-3:1); that there are “no race-based barriers to entry on YouTube (MTD 3:1-
 18 3); and that “YouTube strives to be welcoming to all voices, and the videos . . . reflect a broad
 19 diversity of culture, perspective, and background.” MTD 2:23-25. The Defendants’ cited
 20 language from the Exhibits and SAC neither support the assertions made, nor do they dispute,
 21 much less negate, that Defendants engage in racial discrimination by filtering and blocking content
 22 and access to services that is based, at least in part, on race; moreover, that Defendants have been
 23 doing so since 2017.

24 **III. THE COURT SHOULD CONVERT DEFENDANTS’ RULE 12(b)(6) MOTION TO**
 25 **A RULE 56 MOTION FOR SUMMARY JUDGMENT BECAUSE DEFENDANTS**

27 _____
 28 ⁴ *Prager Univ. v. Google LLC*, 2019 Cal. Super. LEXIS 2034 (Cal. Super. Ct. Nov. 19, 2019).

RAISE MATERIAL ISSUES OF DISPUTED FACT IN THEIR MOVING PAPERS

Generally, in ruling on a Motion to Dismiss under Rule 12(b)(6), Courts cannot consider materials outside of the complaint. *Paulsen v. CNF, Inc.* (N.D. Cal. 2005) 391 F.Supp.2d 804, 807. *Haley v. City of Boston* (1st Cir. 2011) 657 F.3d 39, 46. The Court should not consider new facts alleged in Defendants' Motion. "[W]hen a district court relies on material from outside the pleadings, the court converts the motion to dismiss into a motion for summary judgment." *Price v. Philpot* (10th Cir. 2005) 420 F.3d 1158, 1167. If the Court hears matters outside the pleadings were presented and not excluded, the court is required by Rule 12(b) to treat the motion to dismiss as one for summary judgment and to dispose of it as provided in Rule 56. *Carter v. Stanton* (1972) 405 U.S. 669, 671.

Here, the Defendants have presented to the Court fourteen documents, three of which were not even alluded to in the Complaint. Defendants have made numerous factual assertions disputing Plaintiffs' allegations based on those documents, as well as other factual assertions supported by citation to improper materials, and factual assertions that are not supported by any cited material (*see* Ramos Dec. Ex.A-C), to which Plaintiffs object. Should the Court consider or rely on any of the Exhibits and/or factual assertions to which Plaintiffs object, the Court should treat the motion "as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all material that is pertinent to the motion." *Williams v. County of Alameda* (N.D. Cal. 2014) 26 F.Supp.3d 925, 936.

If Defendants' factual assertions are to be believed, it appears that there may exist a "genuine dispute as to a material fact" regarding whether Defendants base decisions regarding filtering and blocking content and access to services, at least in part, on the race of the creator and/or viewers, and whether Defendants' practices evidence an intention to engage in race based discrimination. Under the circumstances, the disputed facts should be resolved by a Rule 56 Motion, not a Rule 12(b)(6) Motion. *See Global Network Communications, Inc. v. City of New York*, 458 F.3d 150, 154-155 (2nd Cir. 2006); *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1207 (9th Cir. 2007); *see also Rodriguez v. Wells Fargo Bank, N.A.*, No. 11-CV-05172 RMW, 2011 WL 6304152, at *3-4, 5 (N. D. Cal. Dec. 16, 2011); *Duncan v. Cohen*, No. C08-2243

BZ, 2008 WL 2891065, at *5 (N.D. Cal. July 22, 2008); *Intermedics, Inc. v. Ventritex, Inc.*, 775 F.Supp. 1269, 1275 (N.D. Cal. 1991), *aff'd sub nom. Intermedics, Inc. v. Ventritex Co.*, 991 F.2d 808 (Fed. Cir. 1993). If the Court does treat Defendants' Motion as a Rule 56 motion to dismiss, Plaintiffs should be granted leave to conduct discovery regarding the factual dispute over Defendants' filtering and blocking content and access to services based on the race of the creators and viewers.

IV. IN THE ALTERNATIVE, THE COURT SHOULD STRIKE DEFENDANTS' UNSUPPORTED OR UNSUPPORTABLE FACTUAL ASSERTIONS AND EXHIBITS

While it is true that the Federal Rule of Civil Procedure expressly authorize motions to strike only pleadings and portions of pleadings, nevertheless, the Court also has inherent authority to strike documents and evidence. *See Sierra Pacific Industries v. U.S. Dept. Agriculture*, 40 Media L. Rep. 1499, at *3 ("The court retains the inherent authority to strike any documents it finds to be improper"). The Court's inherent authority includes the power to strike improper evidence, such as declarations and exhibits. *See Schmitz v. Mars, Inc.*, 261 F.Supp.2d 1226, 1229 (D. Ore. Mar. 6, 2003) (striking declaration and exhibit submitted in connection with a motion to dismiss); *see also Doe v. Webster*, 606 F.2d 1226, 1243 (courts "strike improper evidence"); *In re NASDAQ Market-Makers Antitrust Litigation*, 164 F.R.D. 346, 249-250 ((citing *Jenkins v. City of New York*, No. 91 Civ. 3639 (RLC), 1992 WL 147647 (S.D.N.Y. June 15, 1992) (striking affidavit opposing summary judgment as improper hearsay)).

A. The Court Should Strike Defendants' Exhibits

1. Defendants failed to provide any foundation for purposes of establishing the authenticity or relevancy of the Exhibits

In the context of a Rule 12(b)(6) Motion, the Court may not consider documents that are not indisputably the basis for the contract between the parties, without converting the motion to a Rule 56 Motion. *See BJC Health System v. Columbia Cas. Co.*, 713 F.3d 502, 511 (8th Cir. 2013). The Court may only consider extrinsic evidence that is not attached to the SAC **where the documents' authenticity is not contested, and the SAC necessarily relied on it.** *See Johnson v.*

1 *Federal Home Loan Mortg. Corp.* (9th Cir. 2015) 793 F.3d 1005, 1007-1008. The mere mention
 2 of any of the Exhibits in the SAC does not suffice for purposes of allowing the Court to consider
 3 the Exhibits. *See Coto Settlement v. Eisenberg* (9th Cir. 2010) 593 F.3d 1031, 1038.

4 In this case, it is undisputed that the parties are governed by “an online, consumer form
 5 service contract(s).” SAC ¶83. Those governing agreements include the YouTube Terms of
 6 Service (“TOS”) (SAC ¶74), “Google’s Privacy Policy,” and “Community Guidelines” (SAC ¶7,
 7 n.2) which have been modified by Defendants ‘without notice.’” SAC ¶77; *see* SAC ¶88
 8 (“Defendants routinely change or amend the provisions of these agreements and do so unilaterally,
 9 without adequate notice to users.”) Nonetheless, the Court should not consider the Defendants’
 10 Exhibits because (a) the authenticity of those documents is not established; and (b) there is no
 11 evidence that the SAC incorporates, quotes or relies on those iterations of the YouTube Terms of
 12 Service, Community Guidelines, and AdSense Terms of Service which are attached to the MTD as
 13 Exhibits.

14 The use of online contracts, which Plaintiffs executed electronically, creates special
 15 problems in this litigation: only Defendants know which version(s) of the agreements apply to any
 16 given Plaintiff, at any point in time. *See* SAC ¶89. Plaintiffs “do not have access to or understand
 17 the TOS or agreement(s), let alone which version of the TOS and other agreement(s) may govern a
 18 particular action or conduct that occurs on a particular date.” SAC ¶90.

19 Plaintiffs each joined YouTube at different times over a ten year period. Plaintiff
 20 Muhammad joined YouTube in 2006. SAC ¶315. Plaintiff Lewis joined YouTube in 2016. SAC
 21 ¶ 247. The contract documents and attachments in the form of policies and articles are not dated
 22 generally; when they do reflect a date, the date is merely the month and year of the last change
 23 made to the document; it does not identify the textual change made. *See* Exhibits 1-14.

24 Before the Court should consider any of the Exhibits, at the very least, Defendants must
 25 provide foundational facts establishing that each of the Plaintiffs executed the contract documents
 26 as they appear attached as Exhibits to the White Declaration and provide the date when they were
 27 executed. Absent this information, Defendants’ Exhibits may well be documents that were never
 28 signed or which were amended or altered *after* Plaintiffs filed their lawsuit, in order to undermine

1 Plaintiffs' claims, and therefore would be irrelevant to this dispute. Once the operative YouTube
 2 Terms of Service and AdSense Terms of Service are properly identified and dated, Defendants can
 3 then identify which of the Community Guidelines and related policies were incorporated by
 4 reference in those Terms of Service, and when each was in effect. Without such foundational
 5 information, there is no way to determine which terms and policies were in effect when
 6 Defendants restricted, removed, and/or demonetized Plaintiffs videos, and whether Defendants
 7 were acting in accordance with their own contractual obligations in doing so.

8 Absent basic foundational facts, the Exhibits constitute facts outside of the Complaint
 9 which the Court may not consider. Nor may the Court take judicial notice *sua sponte* of the
 10 Exhibits without first affording Plaintiffs an opportunity to be heard and object. *See Cooperativa*
 11 *de Ahorro y Credito Aguada v. Kidder, Peabody & Co.* (1st Cir. 1993) 993 F.2d 269, 273. Even
 12 where the Court desires to do so; here, where Plaintiffs reasonably dispute the authenticity and
 13 relevancy of the Exhibits, the Court should not take judicial notice of the documents. *See Intri-*
 14 *Plex Technologies, Inc. v. Crest Group, Inc.* (9th Cir. 2007) 4599 F.3d 1048, 1052.

15 Where Defendants failed to provide any foundation to establish their Exhibits are contracts
 16 between the parties, in effect prior to the filing of the Plaintiffs' Complaint, the Exhibits are
 17 irrelevant for purposes of a motion to dismiss. Accordingly, Plaintiffs object to Exhibits 1-14 on
 18 grounds that Defendants failed to authenticate them, and failed to establish that they are relevant to
 19 Plaintiffs' claims. Therefore the Court should strike them as irrelevant.

20 **2. Defendants are presenting exhibits which are not subject to a request** 21 **for judicial notice**

22 Regardless of whether the Court strikes all of the Exhibits due to the absence of
 23 foundational facts, the Court should strike Exhibits 7, 11 and 13, because they do not constitute
 24 contract documents and were not incorporated by reference or quoted in the SAC. Accordingly,
 25 Plaintiffs object to Exhibit 7 "Rate Your Content With Self-Certification," Exhibit 11: YouTube's
 26 October 2020 "Channel Monetization Policies," and Exhibit 13: Google's undated "Advertiser-
 27 Friendly Content Guidelines."

28 In ruling on a 12(b)(6) motion, courts may properly consider information from documents

1 incorporated by reference into the complaint. *Coto Settlement v. Eisenberg* (9th Cir. 2010) 593
 2 F.3d 1031, 1038. To consider the Exhibits attached to Defendants’ Motion, the Court first must
 3 find that they are “integral to the plaintiff’s claims and [their] authenticity is not disputed.” *See*
 4 *Parrino v. FHP, Inc.* (9th Cir. 1998) 146 F.3d 699, 706 n.4 (superseded by statute on other
 5 grounds).

6 Exhibits 7, 11 and 13 are not “integral” to Plaintiffs’ claims: Exhibit 7 is an *article* about
 7 “self-certification” for users who want to monetize content. It does not contain contractual terms.
 8 Exhibit 11 is not incorporated by reference in the contract documents as defined by the Complaint,
 9 which are limited to “YouTube Terms of Service, the Community Guidelines, or the AdSense
 10 Terms of Service.” *See* SAC n.2. Exhibit 13 is another *article* discussing “Advertiser-Friendly
 11 content.” Even if Defendants were to provide a proper foundation for their Exhibits, the Court
 12 should not consider Exhibits 7, 11 or 13 for any purpose in the context of a Rule 12(b)(6) Motion
 13 because they constitute Defendants’ self-serving publications which are not incorporated into the
 14 contract between the parties. *Cf., Parrino v. FHP, Inc.* (9th Cir. 1998) 146 F.3d 699, 706 n.4.

15 **B. The Court Should Strike Defendants’ Improper Unsupported/Unsupportable**
 16 **Factual Assertions**

17 Defendants make numerous factual assertions quoting or citing to the Exhibits. To the
 18 extent that these assertions are based on the Exhibits, they should be stricken along with the
 19 Exhibits. Defendants also make a number of factual assertions that either have no citation to
 20 supporting SAC text,⁵ or wrongly cite to passages in the SAC.⁶ To the extent that the SAC
 21 paragraphs cited do not support the Defendants’ assertions, the Court should strike all such factual
 22 assertions.

23 Defendants further make a number of factual assertions with citation to improper matters,
 24

25 ⁵ *See* Exhibit C which sets forth Defendants’ assertions which are not supported by citation.

26 ⁶ *See* Exhibit A which sets forth Defendants’ assertions with the text that Defendants wrongly cite
 27 in support.
 28

1 such as citation to Judge Walsh’s order in *Prager II*.⁷ See MTD 2:5-9, 26:6-14. The Civil Local
 2 Rules, Rule 3-4(3) prohibits such citation to an “uncertified” court opinion, if it is uncertified
 3 pursuant to any rule similar to Local Rule 7-14. *Prager II* is a Santa Clara County Superior Court
 4 decision that is on appeal. California Rules of Court, Rule 8.1115 prohibits citation to any opinion
 5 that is not certified for publication. Cal. R. Ct., R. 8.1115. Because *Prager II* has not been
 6 certified for publication, Defendants cannot cite or rely on the opinion in this matter. See *id.*; see
 7 also Ramos Dec. Ex. B.

8 **V. CONCLUSION**

9 Defendants appended to their Rule 12(b)(6) Motion numerous Exhibits for which
 10 authenticity is not established (and Plaintiffs dispute both authenticity and relevancy), and
 11 Defendants make numerous factual assertions (either based on Defendants’ foundation free
 12 Exhibits, based on improper matters, or based on nothing whatsoever), in order to dispute
 13 Plaintiffs’ allegations that Defendants engaged in race based filtering and blocking content and
 14 access to services, and that they intend to do so. Under the circumstances, the Court should
 15 convert Defendants’ Rule 12(b)(6) Motion to a Motion for Summary Adjudication under Rule 56,
 16 and allow Plaintiffs to conduct discovery regarding the material facts disputed by Defendants. In
 17 the alternative, the Court should strike the Defendants’ Exhibits and the unsupported or improper
 18 factual assertions.

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⁷ *Prager Univ. v. Google LLC*, 2019 Cal. Super. LEXIS 2034 (Cal. Super. Ct. Nov. 19, 2019).

1 DATED: January 20, 2020

Respectfully submitted,

2 BROWNE GEORGE ROSS
3 O'BRIEN ANNAGUEY & ELLIS LLP

4 Peter Obstler
5 Eric M. George
6 Dennis S. Ellis
7 Debi A. Ramos

8 

By: _____

Debi Ramos

9 Attorneys for Plaintiffs Kimberly Carleste Newman,
10 Lisa Cabrera, Catherine Jones, Denotra Nicole Lewis,
11 Andrew Hepkins, Harvey Stubbs, Khalif Muhammad,
12 Keu Reyes and Osiris Ley